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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

XIAO YAN ZHANG,

Plaintiff and Appellant,

v.

ERIC R. CARSON, as Trustee, etc.,

Defendant and Respondent.

E067482/E068413

(Super.Ct.No. RIC1506075)

OPINION

APPEAL from the Superior Court of Riverside County. Daniel A. Ottolia, Judge.

Reversed with directions.

Pepper Hamilton, Pamela S. Palmer, Veronica A. Torrejon, and Sean P. McNally  
for Plaintiff and Appellant.

Brown Rudnick, Ronald Rus, and Leo J. Presiado for Defendant and Respondent.

This case arose from a real estate transaction gone bad. Appellant, Xiao Yan Zhang, believed she and her family had entered a purchase agreement for a residential property at 39100 Pauba Road in Temecula, California, called the Pauba Ranch. On April 10, 2015, Zhang signed an offer, including provisions related to seller financing, and submitted it the next day. The seller, respondent Eric R. Carson, signed and initialed the purchase agreement on April 13, 2015, and returned it to their mutual real estate agent. However, Carson failed to sign one paragraph confirming his acceptance. When Carson arrived at the escrow meeting three days later and noticed he had not signed, he terminated the meeting and refused to complete the sale. Zhang filed this lawsuit seeking, among other things, specific performance.

After a bench trial on the equitable issues, the trial court held the parties had not reached an agreement because the confirmation of acceptance paragraph was “all important” and Carson’s behavior in refusing to proceed with escrow was an “outward manifestation of [Carson’s] intent not to proceed with the purchase and sale of the Pauba Ranch.” The court concluded there was no meeting of the minds and therefore no sales agreement. The court awarded Carson attorney fees as the prevailing party.

We conclude Carson and Zhang had entered a binding agreement on April 13 despite Carson’s failure to sign the confirmation paragraph at the escrow meeting on April 16, and Carson’s conduct at that meeting was not material to whether they had reached an agreement three days earlier. We therefore reverse the trial court’s judgment and order the court to enter a judgment of specific performance and declaratory relief in Zhang’s favor. Since Zhang is the prevailing party, we reverse the judgment awarding

attorney fees and costs to Carson, and remand to the trial court to make a determination about Zhang's attorney fees as the prevailing party.

## **I FACTS**

### *A. Overview*

Zhang's first amended complaint asserted claims for anticipatory breach of contract, breach of the covenant of good faith and fair dealing, and for specific performance and declaratory relief. The trial court reserved jury issues and conducted a bench trial on Zhang's causes of action for specific performance and a declaration that the purchase agreement is valid and enforceable.

Relevant to this appeal, Carson defended by asserting (i) he never accepted Zhang's offer, (ii) Zhang excused his performance by failing to provide support for her ability to repay the seller-financed loan, and (iii) specific performance was unavailable because of contingencies to closing escrow. During a five-day bench trial, Carson, Zhang, their real estate agent, Ralph Liu, and the escrow agent, Laurie Thomas testified. The parties also put on experts regarding the use of California Association of Real Estate forms (CAR forms) in real estate transactions.<sup>1</sup> We recount *post* contents of their testimony.

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<sup>1</sup> The parties filled out forms published by the California Association of Realtors to codify their agreement.

*B. The Negotiation and Alleged Execution of the Purchase Agreement*

Carson is the sole trustee of the Eric R. Carson Living Trust (trust), created in 2013 to benefit Carson's four children. The trust owns the Pauba Ranch. In June 2013, Carson listed the ranch for sale with Liu, a real estate broker who specializes in selling high-end properties like ranches, wineries, estate homes, and hotels to wealthy Chinese buyers.

Liu listed the ranch for Carson, asking \$7.5 million. He said he showed the ranch to many potential buyers over the next two years, but the property didn't sell. In about February 2015, Carson told Liu he was willing to lower the asking price and indicated his minimum acceptable price was \$5.45 million, provided the buyer put \$1.75 million down and agreed to pay the remainder over five years at two percent interest.

Between early 2014 and early 2015, Liu showed the ranch several times to Zhang and her husband, Hailin Li, a Chinese real estate developer. Liu said Li visited the ranch at least three times and Zhang visited at least once. He said Li was very interested in the property, but he thought the initial \$7.5 million asking price was too high. By February 2015, after Carson had indicated to Liu a willingness to reduce his price, negotiations were under way. Liu acted as an agent for both parties.

Eventually, Li and his family offered \$5.7 million. The parties agreed on a \$100,000 non-refundable earnest money deposit and payment of \$900,000 by close of escrow. However, Li requested a six-year financing period with no interest and asked that a second payment of \$750,000 be made contingent on the sale of a Sunset Beach

property they owned. In the end, Li and Zhang agreed to a five year term to pay the balance, and a noncontingent \$750,000 second payment within 90 days after close of escrow. According to Liu, “That’s why Eric [Carson] grab[bed] it.”

On April 7, Carson took a draft purchase agreement and an addendum with him on a fishing trip to Montana. Carson was traveling with his long-time friend, Patrick McClellan, who is an attorney and a real estate broker. Carson said he asked McClellan to look at the contract and advise him on whether to go forward with the offer.

On April 9, McClellan sent an email to Liu requesting changes to the offer. “I am Eric Carson’s lawyer. I have reviewed the documents that you forwarded to Eric and request that the changes on the attached memo be made to the documents we have seen so far.” The memo listed provisions of the offer to delete because they didn’t apply to the sale or were addressed in an addendum.

The memo also proposed specific language regarding payment and financing, and Carson’s continued occupancy after the sale. “[A]dd a new paragraph #3 that reads as follows: [¶] ‘Seller to carry a note secured by a first deed of trust encumbering the property in the amount of \$4,700,000 at 0% interest. \$750,000 to be paid upon the sale of the Sunset Beach property (MLS#OC15038460), or within 90 days after close of escrow, whichever comes first. Four (4) annual payments of \$100,000 each, beginning 365 days after close of escrow. The remaining balloon payment of \$3,550,000 to be paid at the end of the fifth year after close of escrow.’ [¶] . . . [¶] ‘Buyer agrees that Seller and his family shall have the exclusive right, to continue to occupy the property, rent free,

for up to one year after close of escrow, in return for continuing to manage the ranch and overseeing vineyard expansion. Buyer agrees that Sellers' management of the ranch shall be consistent with Seller's past management of the ranch. Buyer agrees that vineyard expansion, if any, shall be at buyer's sole expense. Buyer and Seller agree that Seller's free occupancy may be terminated at any time, by either Buyer or Seller, upon 60 days written notice.'"

According to Liu, he told McClellan it was not possible to edit the form used for the offer, but said he would put the proposed new terms in an addendum. The next day, after he did so, McClellan emailed Liu, thanking him and declaring the terms were satisfactory to Carson. "Thank you for making the changes to the Addendum. It is now correct and I think we are very close to having this finished! [¶] I have attached two things: [¶] First, the Purchase Agreement to which I have made other changes necessary on the face of the document. I don't think any other changes are required. The Purchase Agreement is now consistent with the Addendum and I think is ready to be presented to the Buyer for signature."

The same evening, Liu met with Zhang at her home in San Marino. With Li on the telephone and Zhang's interpreter present, Liu walked Zhang through the forms, and she initialed and signed them. The addendum included the terms McClellan had requested on behalf of Carson, and Zhang signed the addendum without making any changes. The addendum is dated April 10, 2015 and says "The following terms and conditions are hereby incorporated in and made a part of the Residential Purchase

Agreement,” and sets out signature lines beneath the declaration: “The forgoing terms and conditions are hereby agreed to, and the undersigned acknowledge receipt of a copy of this document.” Zhang signed, thereby agreeing to the terms already approved by Carson.<sup>2</sup>

Zhang said she understood signing obligated her to buy the property, and affirmed she had the willingness and ability to do so. She also testified about the resources she and her husband own to establish she had the ability to complete the purchase. Zhang said Li owns the house where she lives with her children in San Marino and another house in Sunset Beach, California. In addition, she said she owns a mansion jointly with her husband in Hong Kong worth about 180 million Hong Kong dollars and another property in Shanghai worth about 10 million renminbi, both rental properties. She said she has signature authority on a Hong Kong bank account worth about \$10 million. According to Zhang, Carson never requested she provide him any financial information during negotiations.

On April 11, Liu sent Zhang’s offer to Carson and McClellan. After a day taken up over a dispute about the terms of Liu’s compensation, Carson texted Liu the morning of April 13, seeming to acknowledge his acceptance. He wrote, “Pauba Ranch. I will meet you at Diamond Escrow on the 16th. Make an appointment for 2 pm and we will open escrow.” Liu responded Carson would “need to fax the complete set of signed

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<sup>2</sup> Zhang also signed a disclosure and acknowledgment that Liu was acting as an agent for both buyer and seller. The form designated Liu as Zhang’s agent for receipt of Carson’s acceptance. The expiration provision gave three days for acceptance, which was April 13.

documents back” to Liu by 5:00 p.m. Hearing nothing, at 3:44 p.m., Liu texted “the offer will expire at 5 pm sharp today. I will inform the buyer regarding your intention not to proceed and follow up accordingly.”

As it happened, Carson was driving home from Montana. He and Liu spoke several times by phone through the day. Their versions of their discussions conflict, but they agree as to the basic facts. Carson stopped for the night at a Marriot hotel in Provo, Utah. At the hotel, Carson initialed and signed the offer, then faxed the forms back to Liu. On the fax cover page, he wrote “This should cover it. Diamond Escrow April 16th 2 pm.”

Among the documents Carson returned with his initials and signatures were the CAR forms and the addendum, two dual agency forms acknowledging Liu’s role as agent for both parties, a commission agreement, and four CAR disclosure forms. Carson placed his full signature at the bottom of the addendum across from Zhang’s signature, where it says “The forgoing terms and conditions are hereby agreed to[.]” The addendum identifies the buyer, seller, property, sales amount, and terms of payment, all the elements of an enforceable real estate sales contract.

Carson also signed the locations on the CAR forms calling for the seller’s initials and signatures, with a single exception. On pages one through seven of the form, he placed his initials in a field located in the lower right-hand corner of each page. On the eighth page, he initialed in three fields set in the margins, indicating his acceptance of the liquidated damages and arbitration of disputes provisions. The ninth page had no place

for the seller to sign. The last page (page 10) is dominated by a box pertaining to real estate brokers, not buyers or sellers. However, there is a paragraph near the top of the form (paragraph 32) which has a place for the seller's initials to indicate "REJECTION OF OFFER" and a place for the seller's signature under "ACCEPTANCE OF OFFER." Paragraph 32 also provides, "A binding Agreement is created when a Copy of Signed Acceptance is personally received by Buyer or Buyer's authorized agent whether or not confirmed in this document. Completion of this confirmation is not legally required in order to create a binding Agreement." Carson indicated neither his acceptance nor his rejection of the offer in paragraph 32; it's simply blank.<sup>3</sup>

After he received Carson's fax, Liu texted Carson, "ok you are all set! sent to escrow already, the train will be in motion to tomorrow [] will introduce you to laurie thomas at diamond valley escrow and set up a meeting for you on thursday at 2 pm." Liu texted Carson a few minutes later to tell him Li had called and Liu had reported Carson's acceptance with congratulations. Carson didn't respond. Liu emailed Laurie Thomas at Diamond Escrow the same night, attaching the "countersigned purchase agreement" and advising "[t]he seller will come over to your office on Thursday the 16th at 2:00 p.m. to sign and notarize escrow documents."

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<sup>3</sup> Liu said he didn't notice Carson hadn't signed page 10 and, when it was brought to his attention, said he believed it was an oversight, noting, "The form used to be . . . the signature under the bottom. They changed the new form to be on the top."

After receiving Liu's report of Carson's acceptance, Zhang wired the \$99,975 non-refundable deposit, which arrived at Diamond Escrow early on April 16, before Carson's appointment. The escrow officer said the escrow company still has the deposit.

*C. Carson's Repudiation of the Sale*

Carson said when he got home from Montana he discovered he had received an unsolicited offer from another potential Chinese broker, but at trial he said he didn't remember the terms. On April 16, he went to Diamond Escrow as scheduled. Thomas, the escrow officer, said she presented him with escrow instructions and documents, and pointed out that he needed to sign paragraph 32.

Carson said when the escrow officer brought the omission to his attention, he asked, "Does this mean there is no—that there is no deal? She said, 'yes.'" Thomas said she didn't remember such an exchange. According to Thomas and her notes, Carson then said he did not feel well, was not going to sign, and left with the documents. Thomas said she thought Carson would come back and sign another day. She said she understood Carson had already accepted the offer and came to sign escrow documents and a notarized deed. She said she asked him to sign paragraph 32 to get the date of acceptance for the escrow company's automated program, which calculates the 90-day escrow from the acceptance date.

At trial, Carson said he didn't sign or initial paragraph 32 because he didn't intend to accept the offer. He said, the form "asked for an initial and it asks for a signature. So where it asks for an initial or a signature, that's where I signed, until I got to the one that

was accepting the offer, and I didn't want to sign that, so I didn't." Carson admitted, however, the addendum was "generally the offer that was made." Asked about the signature on the addendum, he responded, "That's my signature for accepting the—to acknowledging the offer."

The addendum Carson signed says its "terms and conditions are hereby incorporated and made a part of the residential purchase agreement," but he said he didn't understand that to be the case. He said, "At the time, again, I was very sick. I probably didn't read every detail," and "I was just signing to get [Liu] off my back. When I read the one that was the purchase agreement, I knew that I wasn't going to sign that." According to Carson, he meant his initials and signatures to indicate only that he "acknowledged the receipt of the offer"—a formulation he used repeatedly at trial. However, nothing in his contemporaneous correspondence with Liu indicated that was his intention. Nor did Carson acknowledge receipt of the prior offer by initialing and signing those documents; instead, he said he threw the documents away.

#### *D. The Expert Custom and Usage Testimony*

Carson put forward an expert, Steven High, to explain the custom and usage of CAR forms in the real estate industry. High is not a lawyer or a licensed real estate broker, but held himself out as an expert on the use of CAR forms.

Zhang filed a motion in limine to exclude High's testimony as lay opinion on contract formation, which is a question of law to be determined by the court. The trial court granted the motion in part and denied it in part, holding High would not be allowed

to give legal opinions or conclusions, but only to testify regarding custom and usage of CAR forms.

At trial, High said signing paragraph 32 is the only way a seller can accept an offer under the CAR regime. He said paragraph 32 is also the only place a seller can authorize an agent to communicate acceptance. According to High, the fact Carson did not sign paragraph 32 indicates he neither accepted Zhang's offer nor authorized Liu to communicate his acceptance. High conceded Carson's signature on the addendum indicated he had accepted those terms. He relied for these opinions on a book available to CAR members entitled "Your Guide to the Residential Purchase Agreement and Related Forms."

Zhang's rebuttal expert, Michael Russell, is a licensed real estate broker who does not use CAR forms in his practice, but handles fully negotiated real estate transactions. He reviewed the purchase agreement form and addendum in this transaction and concluded "[t]he buyer and seller did reach agreement, and they executed—and they each executed the documents necessary to open the escrow in this transaction."

#### *E. The Trial Court's Decision*

After trial ended on September 13, 2016, the court issued a proposed statement of decision, which it adopted as the basis for the judgment.

The court rejected Carson's argument Zhang had "failed to perform all conditions precedent to [Carson]'s performance, thereby excusing [Carson] from further performance under the contract, by failing to provide the financial information." The

court found Carson had never required the buyers to demonstrate financial pre-qualification, and his recourse was to serve a five-day request for performance to provide credit information, which he never did.

However, the court also found the parties did not form an agreement. The court found both the CAR forms and the addendum “were signed and initialed by [Carson] on April 13, 2015, and then faxed back to the broker. The documents were faxed from Provo, Utah, as Mr. Carson was returning to California from a vacation in Montana.” But “[o]n April 16, 2015, [Carson] was asked to go to the escrow company to sign additional documents, at which time he was expressly asked to sign Paragraph 32 of the [CAR forms] by the escrow officer. [Carson] refused to sign the documents at the escrow office because he ‘was not going to accept the offer’ and he then walked out. [Citation.] This refusal to sign the document at the escrow office is a clear, objective, and outward manifestation of [Carson]’s intent not to proceed with the purchase and sale of the Pauba Ranch. Therefore, it should have been obvious to [Zhang] that there was no mutual consent to the contract as early as April 16, 2015.”

The trial court acknowledged “mere lack of a signature does not render a contract unenforceable,” but characterized the signature missing on the CAR forms as “arguably the most important, key paragraph” and “the all important [p]aragraph.” The court noted it found persuasive expert High’s testimony that “there can be no acceptance of an offer to purchase when the seller has not signed Paragraph 32 of the CRPA, because Paragraph

32 is the only place on the contract where the seller can acknowledge his consent to sell the property on all the exact terms and conditions offered.”

The court concluded the parties did not enter a binding contract and entered judgment for Carson on Zhang’s causes of action for specific performance and declaratory relief. Zhang filed a timely appeal.

*F. Attorney Fees*

The trial court retained jurisdiction to consider Carson’s request for attorney fees as the prevailing party (Civ. Code, § 1717, subd. (a), unlabeled statutory citations refer to this code) and for an award of costs. The trial court entered an amended judgment in favor of Carson, awarding \$260,440 in attorney fees and \$22,023.87 in costs against Zhang on May 26, 2017. On May 30, 2017, Zhang filed a timely notice of appeal of the amended judgment. We consolidated Zhang’s appeals from the two judgments.

## **II**

### **ANALYSIS**

Zhang argues we should reverse the judgment because the trial court improperly relied on Carson’s conduct and statements after the parties had entered a binding and enforceable contract to conclude there was no meeting of the minds. She argues the undisputed material facts establish the parties formed a binding purchase agreement on

April 13, 2015, the date Carson signed and initialed the agreement and addendum and returned it to Liu. We agree.

*A. Contract Formation*

Where the facts material to contract formation are not in dispute, we review de novo whether the parties did in fact form a binding and enforceable contract. (*Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 173 [“Because there are no facts in dispute, the existence of a contract is a question we decide de novo”]; see also *Ukkestad v. RBS Asset Finance, Inc.* (2015) 235 Cal.App.4th 156, 161 [“We apply a de novo standard of review in determining whether the statute of frauds has been satisfied”].) Contract formation requires mutual consent, which cannot exist unless the parties “agree upon the same thing in the same sense.” (§ 1580; see also §§ 1550, 1565.) The facts material to whether the parties consented to the same thing “is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts.” (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208 (*Bustamante*).)

Here, the material facts regarding mutual assent are not in dispute. Zhang initialed and signed the purchase agreement and addendum on April 10, and Carson initialed and signed the same documents on April 13 and returned them to Liu, who represented both parties. Even the circumstances leading up to and immediately after the execution of the purchase agreement are undisputed. After Zhang made her offer, Carson, McClellan, and Liu negotiated additional terms of the sale and financing, Zhang agreed to them, and Liu

incorporated them into an addendum and then returned the documents to Carson and McClellan. After Carson reviewed the revised deal, he faxed the purchase agreement, addendum, and disclosures to Liu and directed Liu to arrange escrow. Liu informed Zhang and Li, and they transferred the earnest money deposit to the escrow account.

Carson points to his failure to sign paragraph 32 of the purchase agreement as evidence he did not consent to the agreement. But that evidence, too, is undisputed. The only question concerns its legal significance. What plainly is not material to the issue of contract formation are Carson's "unexpressed intentions or understandings."

(*Bustamante, supra*, 141 Cal.App.4th at p. 208.) That includes his testimony at trial that he did not intend to indicate his acceptance of the purchase offer by signing and initialing the purchase agreement, but only to "acknowledge receipt of the offer." "[T]he mere state of mind of the parties is not the object of inquiry" in determining whether a contract was formed. (*King v. Stanley* (1948) 32 Cal.2d 584, 591-592.) Nor is Carson's conduct at the escrow office material to contract formation, because it came too late. The conduct relevant to contract formation concerned their "outward manifestations or expressions" at the time they executed the agreement. To hold otherwise would allow parties to point to their later behavior repudiating a binding agreement as evidence there never was a meeting of minds in the first place. We conclude any dispute over Carson's state of mind when he signed the purchase agreement and addendum and over his conduct at the escrow office is a dispute of *immaterial* facts, not relevant to our determination on

contract formation. Consequently, we exercise independent review on the issue of whether the parties formed a contract.

Our discussion of what is material to the determination of whether the parties formed a contract previews our decision on the merits. All the outward manifestations or expressions of the parties from April 10, when Carson's attorney and Liu negotiated additional terms which Zhang accepted, to April 13, when Carson initialed the purchase agreement and signed the addendum, indicate they had agreed to the sale on the terms laid out in the CAR forms and the addendum. The addendum itself identifies the buyer, the seller, the property, the price, and the terms of payment. As such, it contains all the elements of an enforceable real estate sales contract, and more. (*Sterling v. Taylor* (2007) 40 Cal.4th 757, 772 ["A memorandum of a contract for the sale of real property must identify the buyer, the seller, the price, and the property"]; *House of Prayer v. Evangelical Assn. for India* (2003) 113 Cal.App.4th 48, 53-54 [time of performance is not an essential element of an enforceable contract for the sale of real property].) Carson's signature on the addendum created an enforceable contract because it showed an acceptance of Zhang's offer as set out in the CAR forms and supplemented in the addendum after additional negotiations. (See *Behniwal v. Mix* (2005) 133 Cal.App.4th 1027, 1037.)

Carson does not contend the purchase agreement omitted any essential term, only that he did not agree to the terms because he did not indicate his acceptance in paragraph 32. Among other things, that paragraph says, "Seller accepts the above offer,

and agrees to sell the Property on the above terms and conditions. Seller has read and acknowledges receipt of a Copy of this Agreement, and authorizes Broker to Deliver a Signed Copy to Buyer.” Carson argues he did not accept the offer because he did not sign under that language.

The provision does not have the legal significance Carson attaches to it. The contract makes this clear later in the paragraph where it says “[a] binding Agreement is created when a Copy of Signed Acceptance is personally received by Buyer or Buyer’s authorized agent whether or not confirmed in this document. Completion of this confirmation is not legally required in order to create a binding Agreement; it is solely intended to evidence the date that Confirmation of Acceptance has occurred.” The escrow agent confirmed they use paragraph 32 to get the date of acceptance for the escrow company’s automated program, which calculates the 90-day escrow from the acceptance date. Carson accepted Zhang’s offer by signing the addendum and initialing the pages of the CAR forms which set out the key terms. Failing to sign the confirmation of agreement provision does not by itself negate that acceptance, by the agreement’s own terms as well as under the law. (See § 1641 [“The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other”]; § 1650 [“Particular clauses of a contract are subordinate to its general intent”].)

*Behniwal v. Mix, supra*, 133 Cal.App.4th at p. 1037 is instructive. In that case, the Mixes sought to sell their home. They had two offers and made counteroffers to both potential buyers simultaneously, using a CAR counteroffer form. The form specified “Seller is making a Counter Offer(s) to another prospective buyer(s) on terms that may or may not be the same as in the Counter Offer. Acceptance of this Counter Offer by Buyer shall not be binding unless and until it is subsequently re-signed by Seller in paragraph 7 below.” (*Id.* at p. 1032.) One of the potential buyers accepted the counteroffer by signing the form and returning it to the sellers, but the sellers did not re-sign the counteroffer in paragraph 7. (*Id.* at p. 1033.) Their agent did, however, sign an addendum which referred to terms of the counteroffer. (*Id.* at pp. 1032-1033, 1037.) The parties opened escrow, but after the husband suffered a health crisis, they refused to close and litigation ensued. The Mixes claimed no contract had been formed because they had not re-signed the counteroffer form, which the purchase agreement required to form an agreement. (*Id.* at pp. 1034, 1036.)

The Court of Appeal disagreed. “Item 7 cannot be read in isolation or a vacuum. [Citations.] It must be taken together with the other documents in the transaction, in light of its evident purpose.” (*Behniwal v. Mix, supra*, 133 Cal.App.4th at p. 1037.) The purpose of paragraph 7 was to allow the sellers to choose between the two sets of buyers if both had responded. The court concluded the Mixes were free to reject the deal when they received the Behniwals’ response. However, the court held signing the addendum

was the functional equivalent of signing paragraph 7 because it showed an acceptance of the counteroffer the Behniwals had accepted. (*Ibid.*)

We think similar logic applies here. It is true Carson could have unambiguously accepted the purchase agreement by signing paragraph 32 confirming acceptance. Instead, like the Mixes, Carson failed to sign the original form, but signed an addendum to the agreement which made clear his acceptance of the offer. That signing was sufficient to show the parties had entered an agreement notwithstanding the missing signature on paragraph 32. Indeed, the addendum in this case demonstrates acceptance even more straightforwardly than in *Behniwal*. The addendum is explicitly made part of the purchase agreement, reiterates the essential terms of the purchase agreement, and also says explicitly that “[t]he foregoing terms and conditions are hereby agreed to.” As in *Behniwal*, there is “no other reasonable interpretation of the addendum, and certainly none proffered by [Carson].” (*Behniwal v. Mix, supra*, 133 Cal.App.4th at p. 1038.)

In short, the parties completed an agreement on April 13, 2015, and the trial court should have granted Zhang’s requests for a declaration that they had an enforceable agreement as well as her request for specific performance. The trial court erred by relying on Carson’s testimony at trial that he intended only to acknowledge the offer as well as by relying on his conduct when he repudiated the deal at the escrow meeting. As we indicated above, that evidence was not material to whether a contract was formed in the first place.

Nor did the testimony of Carson's expert, Steven High, provide the trial court a basis for finding the parties had not entered an agreement. High's testimony that signing paragraph 32 is the only way a seller can accept an offer under the CAR regime is both improper as a legal conclusion and incorrect under the law and the contract itself. So is his testimony that paragraph 32 is the only place a seller can authorize an agent to communicate acceptance. The provision says "[a] binding Agreement is created when a Copy of Signed Acceptance is personally received by Buyer or Buyer's authorized agent *whether or not confirmed in this document*. Completion of this *confirmation is not legally required* in order to create a binding Agreement; it is solely intended to evidence the date that Confirmation of Acceptance has occurred." Thus, under paragraph 32, as under the law, Carson could indicate acceptance without signing paragraph 32. He did so when he signed the addendum to the purchase agreement, and the trial court erred by concluding otherwise.

*B. Failure to Fulfill a Condition Precedent*

Carson argues Zhang failed to perform a condition precedent of the contract because she failed to submit financial records to establish her ability to fulfill her commitments. He argues, in the alternative, that her failure to provide such records "invalidates Zhang's offer . . . and precludes formation of a binding contract."

The trial court considered and rejected these arguments because Carson didn't require Zhang to demonstrate financial pre-qualification. According to the court, Carson's recourse was to serve a five-day request for performance to provide credit information, which he never did.

Carson bases his argument on *Realmuto v. Gagnard* (2003) 110 Cal.App.4th 193 (*Realmuto*), which held a *seller's* delivery of a disclosure statement—as required by sections 1102 and 1102.3—is “a nonwaivable condition precedent to the buyer's performance” of a purchase agreement. (*Realmuto*, at p. 201.) He contends the *buyer's* disclosure of financial records called for in sections 2956, 2959, and 2963 is also a condition precedent, in this case of the seller's duty to perform. It is uncontested Zhang did not supply such disclosures.

In *Realmuto*, the court reviewed the statutory scheme concerning seller pre-sale disclosures about the condition of certain residential properties. “The required disclosures include information about the buildings and any significant defects, as well as information about the land itself, including disclosure of hazardous materials, encroachments, easements, fill, settling, flooding, drainage problems, neighborhood noise, major damage from natural disasters, and lawsuits by or against the seller affecting the property.” (*Realmuto, supra*, 110 Cal.App.4th at p. 200, quoting § 1102.6.) The court noted the Legislature had mandated delivery of a disclosure statement before transfer of title (§ 1102.3), provided a buyer had three days to rescind an agreement when a seller delivers a disclosure after signing the offer (§ 1102.3, subd. (c)), and made

disclosure nonwaivable even in “as is” sales (§§ 1102, subd. (c), 1102.1, subd. (a)). From these provisions, the court concluded “the Legislature plainly contemplated that buyers would never be irrevocably committed to performing the contract without having received the required disclosures” (*Realmuto*, at p. 201), and characterized the delivery of the disclosure statement as a condition precedent to the buyer’s performance.

The statutory scheme Carson invokes does not have the same features. These provisions apply to “transaction[s] for the purchase of a dwelling for not more than four families in which there is an arranger of credit, which purchase includes an extension of credit by the vendor.”<sup>4</sup> (§ 2956.) The scheme requires many kinds of disclosures by both buyers and sellers. For example, it requires “[a] description of the terms of the promissory note or other credit documents or a copy of the note or other credit documents” (§ 2963, subd. (b)), disclosure of “the principal terms and conditions of each recorded encumbrance which constitutes a lien upon the property which is or will be senior to the financing being arranged” (*Id.* at subd. (c)), and disclosure of “the date and amount of any balloon payment or the amount which would be due upon the exercise of such right by the lender or obligee” (*Id.* at subd. (g)). The parties do not claim anyone failed to make these disclosures.

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<sup>4</sup> An arranger of credit is “[a] person, other than a party to the credit transaction . . . who is involved in developing or negotiating credit terms, participates in the completion of the credit documents, and directly or indirectly receives compensation for arrangement of the credit or from any transaction or transfer of the real property which is facilitated by that extension of credit,” but does not apply to “an attorney who is representing one of the parties to the credit transaction.” (§ 2957, subd. (a)(1).) In this case, Liu qualifies as an arranger of credit.

Also on the list is disclosure of “the identity, occupation, employment, income, and credit data about the prospective purchaser, as represented to the arranger by the prospective purchaser.” (§ 2963, subd. (i).) Carson complains Zhang did not disclose her income and credit data before he signed the offer. And indeed, Zhang admitted she made no such disclosure because, she says, Carson never requested the information. The question we face is whether Zhang’s failure to make the disclosure relieved Carson of the obligation to perform by closing the transaction.

We conclude the answer is no. The statutory scheme governing vendor-financed residential real estate transactions makes plain failure to make disclosures does not invalidate either credit documents or security documents. (§ 2965.) “The validity of any credit document or of any security document subject to the provisions of this article shall not be invalidated solely because of the failure of any person to comply with this article.” (*Ibid.*) The statute defines “credit documents” as “documents which contain the binding credit terms, and include a note or a contract of sale if the contract spells out terms upon which a vendor agrees to provide financing for a purchaser.” (§ 2957, subd. (e).) It defines “security documents” as including “real property sales contract[s].” (*Id.* at subd. (g).) Both these definitions cover the purchase agreement Carson entered with Zhang. It follows from these plain terms Zhang’s omission did not invalidate the agreement.

The only remedy the Legislature provided is for aggrieved parties to recover damages incurred as a result of willful omissions. (§ 2965) “[A]ny person who willfully violates any provision of this article shall be liable in the amount of actual damages

suffered by the vendor or purchaser as the proximate result of the violation.” (*Ibid.*) No liability accrues, however, “if it is shown by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid any such error.” (*Ibid.*) It is notable too, that the statute—unlike the seller property condition disclosure provisions at issue in *Realmuto*—does not specify waiver of its disclosure requirements is void as against public policy. (§§ 1102, subd. (c), 1102.1, subd. (a).) Taken together, these provisions convince us the statutory requirements Carson relies on do not make financial disclosures a condition precedent and that Zhang’s omission does not relieve him of the obligation to perform under the agreement.

Carson argues a provision in the seller financing addendum and disclosure form (financing form) gives him a basis for refusing to perform. He contends the form “provides that, within five days of Carson’s acceptance of Zhang’s offer, Zhang is required to deliver to Carson a completed loan application, a credit report, and other financial information . . . and documents verifying her creditworthiness.” Her failure to provide a credit report or documents verifying her creditworthiness, he argues, released him from the duty to perform. Carson misreads the contract. The agreement did not require Zhang to provide a credit report or financial documents to support her credit worthiness. Instead, it places the burden squarely on Carson, as seller, to request these items. By initialing the financing form, Zhang “authorize[d] Seller and/or Agent to obtain, at [Zhang’s] expense, a copy of [her] credit report.” Carson apparently elected

not to obtain a credit report. Though the agreement required Zhang to provide documentation of her finances, the duty would arise only if Carson gave notice and made a reasonable request for such documents. Again, Carson did not request supporting documentation.<sup>5</sup> Thus, under the agreement's plain terms, Zhang's failure to provide information to support her ability to fulfill the repayment terms do not excuse Carson from performing under the agreement.

These provisions did provide Carson protection in the event he had genuine doubts about Zhang's ability to repay the loan. He could have obtained a credit report and demanded Zhang provide reasonable supporting documents to demonstrate she could repay. If he had made the request, and if Zhang refused or provided information insufficient to reassure Carson she could close the sale and repay the loan, the agreement gave Carson the right to cancel the agreement within five days. Carson's witness on real estate transactions acknowledged this feature of the agreement. However, because Carson failed to invoke these rights, he cannot blame Zhang for failing to perform.

### *C. Specific Performance*

Zhang argues she is entitled to specific performance of the purchase agreement. Carson argues she's not because she hasn't shown she's "ready, willing, and able" to perform on the contract. The trial court did not reach this issue because it held the parties

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<sup>5</sup> Carson points to a document request as a request for Zhang's financial support documents. But that request was part of this litigation and occurred after Carson had repudiated the contract.

had not formed a binding contract. Carson in effect asks us to hold Zhang supplied no evidence from which the trial court could have found she was able to perform.

To obtain specific performance, a plaintiff must show the ability and willingness to perform. “The buyer’s financial ability may be proved by showing the purchaser had liquid assets, property which could be sold and the proceeds used as collateral for a loan, or *an actual loan commitment, providing such resources* are sufficient to close the deal. (*Am-Cal Inv. Co. v. Sharlyn Estates, Inc.* (1967) 255 Cal.App.2d 526, 545-546, italics added.) Here, the purchase agreement included an actual loan commitment *by Carson* to provide financing sufficient to close the deal. As we’ve recounted, the addendum to the agreement set out financing for the deal in a form Carson and his attorney insisted on. The agreement required Zhang to pay a deposit, which she paid before escrow opened, but otherwise committed the trust to finance the sale, specifically to “carry a note secured by a first deed of trust encumbering the property in the amount of \$4,700,000 at 0% interest.” This was a binding commitment which gave Zhang the ability to close the sale.<sup>6</sup>

Carson questions whether Zhang ultimately would be able to pay the loan commitment she entered. The agreement required her to pay “\$750,000 . . . upon the sale of the Sunset Beach property (MLS#OC15038460), or within 90 days after close of escrow, whichever comes first,” make “[f]our (4) annual payments of \$100,000 each,

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<sup>6</sup> We note a buyer is not required to prove they have a legally enforceable financing agreement to establish they are able to close. (*Henry v. Sharma* (1984) 154 Cal.App.3d 665, 672; *WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1716.)

beginning 365 days after close of escrow,” and make a “balloon payment of \$3,550,000 to be paid at the end of the fifth year after close of escrow.” But her ability to fulfill these repayment obligations is immaterial to the question whether she had a binding financing agreement which showed she was ready, willing, and able to close the transaction.

In addition, Zhang testified she had liquid assets in the form of \$10 million in a Hong Kong bank account on which she had signing authority. She also testified she owned jointly with her husband other real property worth many times the agreed sale price of the Pauba Ranch. Such evidence plainly would constitute substantial evidence to support a trial court finding that Zhang was ready and willing to perform under the purchase agreement. (*Henry v. Sharma, supra*, 154 Cal.App.3d at p. 672 [We believe the evidence supports the trial court’s finding that the buyers had the ability to pay in the sense that they ““commanded resources upon which [they] could obtain the requisite credit””].) Because the evidence was uncontested at trial, it provides additional support for our conclusion Zhang is entitled to specific performance.

Carson argues we cannot order specific performance because the contract for the sale of the property is not “immediately enforceable.” Carson relies on the principle that courts “will not decree specific performance when the duty to be performed is a continuous one, extending possibly over a long period of time and which . . . will necessarily require the constant personal supervision and oversight of it by the court.” (*Pacific E. R. Co. v. Campbell-Johnston* (1908) 153 Cal. 106, 117.)

While the principle is sound, the attempt to apply it to a purchase of residential property is not. The cases Carson cites involved the prospect of embroiling the trial court in ongoing enforcement. In *Pacific E. R.*, for example, the court declined to order specific performance of a contract for the construction and operation of a railroad. As the Supreme Court explained, the difficulty of enforcing a decree of specific performance for such an undertaking would “require protracted supervision and direction of the court, with the exercise of special knowledge, skill, or judgment in their oversight.” (*Pacific E. R. Co. v. Campbell-Johnston*, *supra*, 153 Cal. at p. 117.) No such concerns arise in ordering specific performance for the sale of a single residential property. (See, e.g., *Henry v. Sharma*, *supra*, 154 Cal.App.3d at pp. 672-673 [affirming order of specific performance despite needing to allow purchasers a reasonable time to obtain financing].)

Finally, Carson argues specific performance is not an appropriate remedy because the agreement gives him the absolute right to disapprove of Zhang’s credit disclosure and cancel the agreement on that basis. We disagree. The agreement says, “Seller, after first giving Buyer a Notice to Buyer to Perform, may cancel this Agreement in writing and authorize return of Buyer’s deposit if Buyer fails to provide such documents within that time, or if Seller disapproves any above item within 5 . . . Days After receipt of each item.” This provision gave Carson the right to request and examine Zhang’s financial documents, use the information to evaluate her creditworthiness, and decide whether she was a good risk for seller financing. It did not give him the right to request the information and use it as a pretext to cancel for some other reason, for example because

he had received a better offer. Courts avoid interpreting contracts in a way that would give one party unilateral authority to cancel it without cause because doing so would render the contract void for lack of mutuality. (See *County of Alameda v. Ross* (1939) 32 Cal.App.2d 135, 145 [holding lack of a “good cause” requirement for cancellation destroyed mutuality of obligation, rendering agreement void].) We decline Carson’s invitation to read the contract in that manner. It follows the cancellation provision does not create a barrier to awarding specific performance.

#### *D. Attorney Fees*

Zhang argues we should reverse the trial court order awarding attorney fees to Carson as prevailing party under section 1717, subdivision (a). She asks us to remand to the trial court with directions to consider awarding Zhang attorney fees under the same provision in an amount to be determined by the trial court. We agree this is the correct approach.

Carson’s attorney fees award was predicated on the trial court’s erroneous determination that the parties had not formed an enforceable purchase agreement. Because we have determined they did form an enforceable purchase agreement and Zhang is entitled to specific performance, we return the matter to the trial court to make a determination about her attorney fees as the prevailing party.

### III

#### DISPOSITION

We reverse the judgment denying declaratory relief and specific performance and remand to the trial court with directions to enter judgment for Zhang on both requests. We also reverse the judgment awarding attorney fees and costs to Carson and remand for the trial court with directions to resolve Zhang's attorney fee claims.

Carson shall bear Zhang's costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SLOUGH  
Acting P. J.

We concur:

FIELDS  
J.

RAPHAEL  
J.